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8 UNITED STATES BANKRUPTCY COURT
9 FOR THE DISTRICT OF OREGON

10 In Re:) Bankruptcy Case
11) No. 05-70329-fra7
12 ROBERT J. OWENS and)
TONI M. OWENS,)
13) MEMORANDUM OPINION
Debtors.)

14 I. INTRODUCTION

15 This Chapter 7 case was commenced on October 12, 2005. The
16 Trustee determined that there were assets that could be liquidated for
17 the benefit of the estate, and proceeded with administration. The most
18 significant asset of the estate, the Debtors' home, was sold by the
19 Trustee in February of 2006. The Trustee filed his final report and
20 application for compensation on July 8, 2008. He sought compensation in
21 the sum of \$17,848.73, the maximum amount allowed by Code § 326. The
22 United States Trustee finds the fee request to be unreasonable under the
23 circumstances, and has objected.

24 The matter came on for hearing on August 19, 2008. After
25 considering the record of the case, the evidence and testimony of the
26 parties, the Court finds that the Trustee should not be paid the maximum

1 fee, and that an order should be entered allowing compensation in the
2 amount of \$15,418.73.

3 II. BACKGROUND

4 The Debtors' schedules reflected assets, including a residence
5 valued at \$299,000 and personal property valued at roughly \$37,000. In
6 his administration of the case, the Trustee abandoned two vehicles as
7 burdensome to the estate, sold the remaining vehicles and other personal
8 property, and the residence. The residence sold for \$309,939.04.
9 According to the Trustee's notice of the proposed sale¹, it was expected
10 that the sale would yield approximately \$20,000 for the estate after
11 payment of liens, fees and costs. At the last minute, a lien holder made
12 demand for an additional \$8,000 as a prepayment penalty according to its
13 contract with the Debtors. The Trustee acquiesced and permitted the sale
14 to close.

15 The effect of the sale was to reduce the amount of money
16 available to unsecured creditors, since the fees and costs generated by
17 the sale exceeded the net return to the estate.

18 III. DISCUSSION

19 A. *Applicable Statutes:*

20 Code § 326(a) provides as follows:

21 (a) In a case under chapter 7 or 11, the court may
22 allow reasonable compensation under section 330 of
23 this title of the trustee for the trustee's services,
24 payable after the trustee renders such services, not
25 to exceed 25 percent of the first \$5,000 or less, 10
percent on any amount in excess of \$5,000 but not in
excess of \$50,000, 5 percent on any amount in excess

26 ¹ See Court Document No. 10: the document was not placed into evidence, but is
subject to judicial notice. Fed.R.Evid. 201.

1 of \$50,000 but not in excess of \$1,000,000,... upon
2 all moneys disbursed or turned over in the case by the
3 trustee to parties in interest, excluding the debtor,
but including holders of secured claims.

4 Code § 330, as amended in 2005, provides in part that: "[i]n
5 determining the amount of reasonable compensation to be awarded to a
6 trustee, the court shall treat such compensation as a commission, based
7 on section 326." § 330(a)(7).

8 *B. Retroactive Application of BAPCPA*

9 Section 330(a)(7) was added to the Bankruptcy Code by the
10 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which
11 took effect on October 17, 2005, several days after this case was filed.
12 The Act, by its terms, provides that it applies to cases filed after the
13 effective date. Accordingly, the U.S. Trustee relies on prior case law
14 such as In re Roderick Timer Co. v. Levy, 185 B.R. 601 (9th Cir. BAP
15 1995), which held that a trustee's reasonable compensation should be
16 determined by multiplying the amount of time spent by the trustee by a
17 reasonable hourly rate; thus, the limits set out in § 326 are a ceiling,
18 and no more.

19 The amendments to the Code dispense with that approach, by
20 providing that the trustee's remuneration is a commission. A commission,
21 in this context, is a remuneration for services or work done as or by an
22 agent, in the form of a percentage on the amount involved in the
23 transaction. Oxford English Dictionary. Section 326 establishes the
24 maximum amount to be paid as a commission. Reading §§ 326 and 330
25 together, the statutory scheme provides that a trustee is presumed to be
26 entitled to compensation in the amount specified in § 326. This

1 commission is subject to reduction if the maximum amount is substantially
2 disproportionate to the value of the trustee's services to the estate.
3 In re McKinny, 383 B.R. 490 (Bankr. N.D. Ca. 2008).

4 Notwithstanding BAPCPA's stated effective date, the addition of
5 §330(a)(7) should be retroactively applied. When a statutory amendment
6 acts to clarify an existing provision rather than to make substantive
7 changes to it, the amendment is normally applied retroactively. ABKCO
8 Music, Inc. v. LaVere, 217 F.3d 684, 689 (9th Cir. 2000). The new
9 language in § 330(a)(7) does no more than to clarify Congress's
10 understanding of § 326, which was enacted prior to, and unchanged by, the
11 2005 amendments.

12 *C. Reasonable Commission*

13 As the McKinny court observed, the presumptive commission
14 established by § 326 must be adjusted to the extent necessary to ensure
15 that the commission actually paid is reasonable. A court may find that a
16 presumed fee is substantially disproportionate to the value of the
17 trustee's services where it is excessive in light of the efforts actually
18 applied by the trustee. This is why courts continue to require that the
19 trustees account for the time expended in each case.

20 The presumptive fee will also be found to be substantially
21 disproportionate if errors or omissions on the part of the trustee result
22 in a material loss to the estate or unsecured creditors. In this case,
23 the Trustee's sale of the Debtors' residence operated to generate a
24 substantial commission for a real estate agent, and increased the
25 Trustee's commission, while reducing the amount ultimately payable to
26 unsecured creditors. As a general rule, estate property should not be

1 sold unless some equity remains, after the payment of liens and costs,
2 for the benefit of unsecured creditors. In re Riverside Investment
3 Partnership, 674 F.2d 634, 640 (7th Cir. 1982).

4 In theory, the Trustee's presumptive fee might be reduced to
5 whatever amount the commission would have been had the real property been
6 abandoned. However, at least under the circumstances in this case, the
7 result would be draconian. A more equitable approach is to reduce the
8 Trustee's commission to the extent necessary to restore to unsecured
9 creditors the amount lost as a result of the sale. The U.S. Trustee
10 calculates this to be \$2,430. Accordingly, the Court finds that the
11 Trustee's commission in this case should be \$15,418.73.

12 The foregoing constitutes the Court's findings of fact and
13 conclusions of law. The Panel Trustee shall submit an order to the Court
14 approving his final account, with the *proviso* that his commission is
15 allowed in the sum of \$15,418.73. The Trustee's request for expenses has
16 not been objected to, and is allowed.

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18 FRANK R. ALLEY, III
19 Bankruptcy Judge
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